COMMONWEALTH OF KENTUCKY
SUPREME COURT
2015-SC-000018-CL

COMMONWEALTH OF KENTUCKY — APPELLANT

VS.

JEFFERSON CIRCUIT COURT
INDICTMENT NO. 13CR2070-003
DIVISION 6, JUDGE OLU A. STEVENS

JAMES DOSS — APPELLEE

# BRIEF OF APPELLANT COMMONWEALTH OF KENTUCKY

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## CERTIFICATE OF SERVICE

Undersigned does hereby certify that copies of this brief were served upon the following named individuals by mail or delivery on December 22, 2015: Hon. Olu A. Stevens, Judge, Jefferson Circuit Court, Division Six, 700 West Jefferson Street, Louisville, KY 40202; Hon. Cicely Jaracz Lambert, Counsel for Appellee, Office of the Louisville Metro Public Defender (by email by agreement to cjlambert@metrodefender.org), Advocacy Plaza, 717-719 W. Jefferson Street, Louisville, KY 40202; and Hon. Jack Conway, Attorney General, by email by agreement to heather.johnston@ky.gov. The undersigned does also certify that the record on appeal has been returned to the Clerk of the Jefferson Circuit Court on or before this date.

Dorislee Gilbert

## INTRODUCTION

This is the Commonwealth's opening brief following this Court's grant of certification of law regarding the following questions:

1. May a trial court dismiss a jury based upon a claim that the fair-cross-section requirement has been violated when there has been no evidence of systematic exclusion of a class of persons from jury service? Does it matter if there was only one African American juror on the panel and that juror was struck randomly?

2. Does the Commonwealth have a right to proceed with a duly selected jury when a *prima facie* case that the jury violates the fair-cross-section requirement has not been made? Is the Commonwealth or a defendant's right contingent upon the racial makeup of the petit jury selected?

3. What, if any, rights do citizens who have been duly selected as jurors have to be sworn and hear a case when there is no evidence of systematic exclusion of a class of persons from jury service?

4. May a trial court disregard and instruct the parties to disregard prior sworn statements made on the record by prospective jurors during a previous *voir dire* proceeding? Should the trial court consider such statements in evaluating whether the juror should be struck for cause? May the parties rely on such prior statements as grounds for seeking removal for cause or as grounds supporting the exercise of a peremptory challenge?

## STATEMENT CONCERNING ORAL ARGUMENT

In its order granting the Commonwealth's request for certification of law, this Court expressed its intent to schedule oral argument. See Appendix 2. The Commonwealth welcomes the opportunity to present oral argument in this case.

## STATEMENT OF POINTS AND AUTHORITIES

**III. Procedures when jurors have previously participated in *voir dire*.**

## STATEMENT OF THE CASE

Appellee, an African American male, and two co-defendants were indicted for Theft by Unlawful Taking over $500 but less than $10,000 and for Falsely Reporting an incident. TR 1-2. The case was assigned to Division Six of the Jefferson Circuit Court, the Honorable Olu A. Stevens, presiding. One co-defendant pled guilty (TR 83-85), and the case against the other was dismissed without prejudice (TR 89). Appellee's case was scheduled for trial on November 18, 2014. On that date, the parties appeared and announced ready for trial. VR 11/28/2014, 10:15:33. The Commonwealth dismissed the false reporting charge. VR 11/18/2014, 10:58:57; TR 121. The trial court entertained several pretrial motions, and a panel[1] of prospective jurors was brought into the courtroom so that jury selection could begin. VR 11/18/2014, 10:15:45 and following.

Appellee objected and requested that the jury panel be dismissed. VR 11/18/2014, 11:04:28. He complained that the jury panel, which consisted of 41 persons and included only one African American male, did not represent a fair cross section of the community. VR 11/18/2014, 11:04:28 and following. Appellee offered no statistical or other evidence regarding the Jefferson County population, the make-up of the larger pool from which the panel of 41 was taken, or any other petit jury, panel, or pool of juror in Jefferson County. VR 11/18/2014, 11:04:28-11:05:05. Specifically, Appellee emphasized that because he was African American, he had a right to be judged by a fair cross section of the community. VR 11/18/2014, 11:05:01. The Commonwealth objected to the motion to dismiss the panel, explaining that the entire jury pool

[1] Jury pool or pool will be used to describe the entire pool of jurors responding to issued summonses. Jury panel, panel, or venire will be used to refer to a portion of the larger pool assigned to a specific court at a particular time. Petit jury or jury will be used to describe the 12 jurors (plus alternates) selected and/or sworn to hear a particular case.

summoned for jury service in Jefferson County represented a fair cross section of the community and that this particular panel had been selected at random. VR 11/18/2014, 11:05:07. The trial court said it would hold the motion in abeyance in order to avoid additional delay for the prospective jurors. VR 11/18/2014, 11:05:21. The trial court expressed surprise about the particular makeup of the panel a described by Appellee's counsel, indicating that this was the first time it ever had a panel with that composition. VR 11/18/2014, 11:05:44.

*Voir dire* commenced. VR 11/18/2014, 11:26:02. The trial court provided introductory remarks, read the indictment, introduced the attorneys, questioned jurors about the statutory requirements for jury service, and gave jurors the opportunity to articulate any need for hardship excuse. VR 11/18/2014, 11:06:26-11:26:05. Then the trial court allowed the parties, by counsel, to question the prospective jurors. VR 11/18/2014, 11:26:10-11:56:19 (Commonwealth's *voir dire*); 12:28:18-01:17:00 (Appellee's *voir dire*). Neither the attorney for the Commonwealth nor the attorney for Appellee questioned the jury panel about issues of race, racial stereotypes, or racial biases. *Id.* At the conclusion of *voir dire*, the trial court addressed Appellee's motion to dismiss the jury panel. VR 11/18/2014, 01:23:34 and following. The trial court observed that the panel was not as representative of the community as panels normally are and that it had never had a panel with only one African American juror. VR 11/18/2014, 01:23:34. The trial court was troubled by this occurrence, but found that the panel had been assigned using a random process that was no different than the process normally undertaken to assign a panel of jurors to a courtroom even though this particular panel was not as representative of the racial diversity of the community as panels usually are.

VR 11/18/2014, 01:24:09. The trial court specifically inquired of Appellee whether he had any indication that the process was anything other than random. VR 11/18/2014, 01:24:49. Appellee never answered that question. In fact, he later conceded that the process was random. VR 11/18/2014, 02:52:56.

Appellee's counsel indicated that he had conducted a casual search of some unidentified census and it showed that Louisville's African American population was close to one quarter, about 23%. VR 11/18/2014, 01:26:30. Thus, he argued having one African American juror on a panel of 41 potential jurors established substantial underrepresentation. VR 11/18/2014, 01:26:35. He cited *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977),[2] in support of his motion and argued that the

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[2] In *Castaneda*, there was no question that the respondent had demonstrated a *prima facie* case of discrimination in grand jury selection.

> In support of his motion, respondent testified about the general existence of discrimination against Mexican-Americans in that area of Texas and introduced statistics from the 1970 census and the Hidalgo County grand jury records. The census figures show that in 1970, the population of Hidalgo County was 181,535. United States Bureau of the Census, 1970 Census of Population, Characteristics of the Population, vol. 1, pt. 45, s 1, Table 119, p. 914. Persons of Spanish language or Spanish surname totaled 143,611. Ibid., and id., Table 129, p. 1092. On the assumption that all the persons of Spanish language or Spanish surname were Mexican-Americans, these figures show that 79.1% of the county's population was Mexican-American.
>
> Respondent's data compiled from the Hidalgo County grand jury records from 1962 to 1972 showed that over that period, the average percentage of Spanish-surnamed grand jurors was 39%. In the 2 ½-year period during which the District Judge who impaneled the jury that indicted respondent was in charge, the average percentage was 45.5%. On the list form which the grand jury that indicted respondent was selected, 50% were Spanish surnamed. The last set of data that respondent introduced, again from the 1970 census, illustrated a number of ways in which Mexican-Americans tend to be underprivileged, including poverty-level incomes, less desirable jobs, substandard housing, and lower levels of education.

*Id.* at 485-488, 97 S.Ct. at 1275-1276. Because the respondent had provided such detailed and extensive evidence, he made out a *prima facie* case of discrimination and the burden of proof shifted to the state to rebut the presumption of unconstitutional action. *Id.* at 494, 97 S.Ct. at 1280. In stark contrast, Appellee offered his casual perusal and limited memory of an unidentified census, VR 11/18/2014, 01:26:30, and later even conceded that the process by which the panel was assigned was random, VR 11/18/2014, 02:52:56. Appellee did not establish a *prima facie* case of discrimination in jury selection, and, as will be described in further detail *infra*, the burden never shifted to the Commonwealth.

burden of proof had shifted to the Commonwealth to show that a fair process had been employed. VR 11/18/2014, 01:24:54 and following.

The trial court again remarked that the situation was "very unusual," and turned to the Commonwealth for a response. VR 11/18/2014, 01:27:28. The Commonwealth answered that, although the makeup of the specific panel was unusual, there was no indication that the process by which the particular panel was selected from the larger pool was not random and pursuant to the ordinary practices for assignment of a panel of jurors from the larger pool of available jurors. VR 11/18/2014, 01:27:37 and following.

The trial court reaffirmed that it was finding that there was no indication that the process used to select and assign the particular panel before it was any different than that used when other panels are randomly selected from the larger jury pool. VR 11/18/2014, 01:28:41. While recognizing that the composition of the panel was odd and that the panel was not as diverse as other panels, the trial court found that fact alone did not mean the jury panel did not represent a fair cross section of the community. VR 11/18/2014, 01:28:41. The trial court found that the panel represented a fair cross section of the community, and denied Appellee's motion. VR 11/18/2014, 01:29:16.

The parties moved that certain jurors be struck for cause and exercised their peremptory strikes. VR 11/18/2014, 01:29:31 and following. Neither party sought removal of the sole African American juror by cause or peremptory challenge. *Id.* Because of overlapping strikes, four jurors were required to be struck randomly to finally select the petit jury. VR 11/18/2014, 02:48:51. The court clerk removed four jurors at random. VR 11/18/2014, 02:49:24. One of those jurors was the sole African American man on the panel. VR 11/18/2014, 02:50:45.

Appellee renewed his motion to strike the jury incorporating all arguments he made previously. VR 11/18/2014, 02:50:45. The trial court expressed that although it was "really troubled" by the random removal of the only African American juror, the juror had been struck randomly. VR 11/18/2014, 02:51:47. The trial court reiterated its prior finding that the venire had been selected randomly and overruled the renewed request. VR 11/18/2014, 02:52:18.

Appellee again objected, expressing that even though the process was random, relief was still warranted. VR 11/18/2014, 02:52:50. Without citation to any supporting authority, Appellee argued that intentional conduct to prevent the jury from being a fair cross section of the community was not required for relief because the defendant had a fundamental right to be judged by members of his community. VR 11/18/2014, 02:53:20. Appellee complained because there were no African American jurors but only Caucasian jurors. VR 11/18/2014, 02:53:50. He expressed that he believed the makeup of the jury was prejudicial to him because he is African American and it was unfair for him to have only white people on his jury when racial biases are obvious in society.[3] VR 11/18/2014, 02:54:02. He claimed that he had shown substantial underrepresentation of a class on the jury and the burden shifted to the Commonwealth to put on affirmative evidence. VR 11/18/2014, 02:54:35.

[3] Importantly, although Appellee had the opportunity to question potential jurors regarding any particular biases, including racial biases, he asked nothing about these allegedly "obvious" biases. At one point during *voir dire*, a prospective juror approached the bench to disclose in confidence that when he first came into the courtroom, his first impression, based on the fact that the case was in circuit court and based on Appellee's appearance and stereotypes, was that the case was a murder case. VR 11/18/2014, 01:13:25. Even when questioning this juror, Appellee did not ask the prospective juror to elaborate on what he meant when he mentioned stereotypes. VR 11/18/2014, 01:15:01. Appellee later moved to strike the juror for cause "in the same vein" as his motion to strike the panel because the juror had expressed forming opinions based upon stereotypes. VR 11/18/2014, 01:36:32. The Commonwealth did not object, and the juror was dismissed for cause. VR 11/18/2014, 01:37:28.

The Commonwealth responded that Appellee had received due process, and that although the result was odd in this particular case, there was no basis for thinking what had occurred was the result of anything but randomness. VR 11/18/2014, 02:55:45. The Commonwealth contended that to set aside the jury and to require what Appellee was seeking would require an undoing of the whole jury selection procedure. VR 11/18/2014, 02:56:08. Additionally, the Commonwealth disagreed that there was no diversity amongst the remaining jurors, noting that there was at least one juror who appeared to speak English as a second language and may have been of Latin American descent. VR 11/18/2014, 02:56:25.

The trial court expressed that the issue was difficult because of the underlying assumption that people of races think alike or are fairer to someone of their own race, but pointed out that was not the issue in this case; rather the issue was Appellee's right to have a jury that was representative of the community, which the court believed had been violated because no African American juror remained on the petit jury. VR 11/18/2014, 02:56:46. The trial court disagreed with the statistics previously offered by Appellee and expressed its belief that African Americans made up 18-20% of Jefferson County's population. VR 11/18/2014, 02:57:41. The trial court again expressed that the racial composition of the panel was "unprecedented" in its courtroom and was disturbing to the court. VR 11/18/2014, 02:57:41. The trial court described that its concern was not intent, but rather the result—namely, that Appellee did not have a jury representative of the community because there was not one single African American person on the jury. VR 11/18/2014, 02:57:56. Specifically, because Appellee was an African American man, the trial court was concerned about the lack of any African American juror. VR

11/18/2014, 02:58:04. The trial court granted the motion, stating that it could not "in good conscience" go forward with the jury, and set aside the jury entirely. VR 11/18/2014, 02:58:26. The trial court explained that the panel would be dismissed, that a new panel would be requested for the next morning, and that jury selection would begin anew. VR 11/18/2014, 02:58:27.

The Commonwealth expressed concern over some of the same prospective jurors being in the following day's panel as had been in the dismissed panel. VR 11/18/2014, 02:59:28. Specifically, the Commonwealth was concerned about the jurors speculating about the reasons why a jury had not been seated the first time. VR 11/18/2014, 03:00:47. The trial court agreed that it was likely some of the same jurors would be on the following day's panel but believed the Commonwealth was overly concerned about how members of the panel might speculate about its dismissal. VR 11/18/2014, 03:00:06. The Commonwealth moved the trial be continued until the current pool of jurors was released and a new pool was available because of concern over some of the same individuals who had sat through jury selection being part of the second panel that would undergo jury selection the following day. VR 11/18/2014, 03:00:21. The trial court denied the motion. VR 11/18/2014, 03:00:21. The trial court dismissed the jury panel telling them that an issue had arisen that prevented the seating of a jury at that time and that the prospective jurors should not seek out a reason for their dismissal. VR 11/18/2014, 03:09:10.

The following day a new panel of jurors was assigned to Jefferson Circuit Court Division Six and made available. VR 11/19/2014, 09:34:33 and following. There is no reason in the record to believe that the process by which this second panel of jurors was

assigned to Division Six was anything different than the process by which the first panel had been assigned the day before.[4] The Commonwealth voiced concern about jurors who had taken part in jury selection the previous day and what effect their statements in the prior *voir dire* had on the current proceedings. VR 11/19/2014, 09:50:26. Specifically, the Commonwealth drew the trial court's attention to the presence on the second jury panel of a juror who had been struck for cause from the prior jury panel because of his expressed inability to be fair. VR 11/19/2014, 09:50:26. The Commonwealth sought guidance from the trial court about what procedure it should follow if the juror expressed completely opposite opinions during the second *voir dire*. *Id.* The trial court opined that the jury selection the day before "didn't happen" and that the parties should "erase" what happened in the preceding day's *voir dire* from their minds. VR 11/19/2014, 09:51:25 and following. The trial court instructed that the parties would not be able to incorporate any questions from the day before (VR 11/19/2014, 09:51:56), that they should not make any motions based on anything the jurors said the previous day (VR 11/19/2014, 09:46:46), that they could not impeach jurors with their statements from the day before (VR 11/19/2014, 09:53:02), and that they should not use anything a juror said the day before as a basis for striking a juror (VR 11/19/2014, 09:53:57). The Commonwealth specifically proposed a scenario in which a juror said something that materially contradicted the juror's testimony from the prior day and inquired about the trial court knowing that the juror would be lying during one of the *voir dire* proceedings. VR 11/19/2014, 09:52:59. The trial court opined that it would not be aware that the jury was lying "because nothing happened" on the prior day. VR 11/19/2014, 09:53:08. The trial

[4] In at least one place, the record reveals that because of a particularly high profile trial occurring in a different courtroom, as well as other trials in additional courtrooms, there was a strain on the jury pool. VR 11/18/2014, 03:1 ; VR 11/19/2014, 09:56:19.

court referred to the day the second panel was brought forward as the first day of trial and orally refused to incorporate the *voir dire* from the day before into the trial record, maintaining that nothing in the first *voir dire* was relevant to the second *voir dire*. VR 11/19/2014, 09:34:33, 09:53:15-09:53:38.

The new panel of 41 included 4 African American jurors. VR 11/19/2014, 01:39:20. Appellee renewed his motion to strike the jury panel because of his claim that it did not represent a fair cross section of the community. VR 11/19/2014, 09:55:16. Again Appellee offered no evidence regarding the racial makeup of the community or the current or any past jury pool. *Id.* Appellee expressly stated that he was not blaming the Commonwealth or even necessarily calling into question the procedure. VR 11/19/2014, 09:58:40. The trial court denied the motion pointing out that the panel was more diverse than the panel the day before, though not as diverse as usual. VR 11/19/2014, 09:59:14. The trial court noted that it was not unusual to have only one of 14 jurors on a petit jury be African American in Jefferson County and offered this as the reason it did not grant Appellee's motion to strike the jury panel on the previous day until the lone African American juror was removed from the panel randomly. VR 11/19/2014, 09:59:36. Just as it had previously done with the first panel, the trial court found that the second jury panel was sufficiently constituted. VR 11/19/2014, 09:59:47. The trial court noted, however, that it would entertain any renewed motion if the circumstances changed based on questioning and the exercise of strikes. VR 11/19/2014, 10:42:19.

*Voir dire* commenced. A petit jury was selected. VR 11/19/2014, 02:08:00. After *voir dire* and dismissal of jurors for cause and the exercise of peremptory strikes, all four African Americans remained on the panel. VR 11/19/2014, 01:39:29. Appellee

renewed his motion to dismiss the panel, and the trial court overruled the motion. VR 11/19/2014, 01:41:48. The selected petit jury included all four African American jurors on the panel.11/19/2014, 01:43:08. The jury was sworn, and trial commenced. VR 11/19/2014, 02:12:04. The jury acquitted Appellee. VR 11/20/2014, 06:07:00; TR 119-120; Appendix 1. Pursuant to CR 76.37(10), the Commonwealth sought certification of the law from that final order of acquittal. Specifically, the Commonwealth asked this Court to certify the law regarding the following questions:

**D.** May a trial court dismiss a jury based upon a claim that the fair-cross-section requirement has been violated when there has been no evidence of systematic exclusion of a class of persons from jury service? Does it matter if there was only one African American juror on the panel and that juror was struck randomly?

**E.** Does the Commonwealth have a right to proceed with a duly selected jury when a *prima facie* case that the jury violates the fair-cross-section requirement has not been made? Is the Commonwealth or a defendant's right contingent upon the racial makeup of the petit jury selected?

**F.** What, if any rights, do citizens who have been duly selected as jurors have to be sworn and hear a case when there is no evidence of systematic exclusion of a class of persons from jury service?

**G.** May a trial court disregard and instruct the parties to disregard prior sworn statements made on the record by prospective jurors during a previous *voir dire* proceeding? Should the trial court consider such statements in evaluating whether the juror should be struck for cause? May the parties rely on such prior statements as grounds for seeking removal for cause or as grounds supporting the exercise of a peremptory challenge?

On September 24, 2015, this Court granted the Commonwealth's request for certification of law. Appendix 2.

## ARGUMENT

### I. Preservation.

Most of the issues raised in the Commonwealth's request for certification of law and discussed herein were preserved by the Commonwealth's objections to the trial court's dismissal of the original jury panel and the first selected petit jury. VR 11/18/2014, 11:05:07 and following; VR 11/18/2014, 02:55:45 and following. The final issue raised in the Commonwealth's request for certification of law was preserved by the Commonwealth's discussions with the trial court about the possible need to question prospective jurors about their sworn statements during the prior day's *voir dire*. VR 11/18/2014, 02:59:28 and following; VR 11/19/2014, 09:50:03 and following.

To the extent this Court finds that any of the issues raised by the Commonwealth were not adequately preserved for review by this Court, the Commonwealth requests that this Court review the claims for palpable error under RCr 10.26. "When an appellate court engages in palpable error review, its focus is on what happened and whether the defect is so manifest, fundamental and ambiguous that it threatens the integrity of the judicial process." *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006). Because the Commonwealth does not seek reversal of any judgment but rather seeks clarification of the law regarding issues that are vital to the right to an impartial jury, the integrity of the judicial process is on the line, and review is warranted even if the Commonwealth's efforts to preserve the questions presented by this appeal are deemed insufficient.

### II. The Jury and the Fair-Cross-Section Requirement.

The right to a jury trial "has long been deemed one of the most fundamental" rights in our adversarial system of justice. *Commonwealth v. Simmons*, 394 S.W.3d 903,

907 (Ky. 2013). The right crossed the Atlantic with the American colonists, and has been a mainstay of the American criminal justice system since. *Duncan v. Louisiana*, 391 U.S. 145, 152, 88 S.Ct. 1444, 1449, 20 L.Ed.2d 491 (1968) ("Jury trial came to America with English colonists, and received strong support from them."). The right to trial by jury was incorporated into the Constitution and into the Bill of Rights. Specifically, Article III, Section 2 of the United States Constitution, provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed." The Sixth Amendment of the Bill of Rights sets forth that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." The right to trial by jury extends even to many civil cases. U.S. Const., Bill of Rights, Amend. 7.

Under Kentucky law, "[t]he ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution." Ky. Const. § 7. Further, "in prosecutions by indictment or information, [the accused] shall have a speedy public trial by an impartial jury of the vicinage." Ky. Const. § 11. Moreover, the right to "an impartial jury of the State and district wherein the crime shall have been committed," which is granted by the Sixth Amendment to the U.S Constitution, is made applicable to the states by the Fourteenth Amendment. See *Duncan*, 391 U.S. at 156, 88 S.Ct at 1451 ("The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.").

> The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. *Duncan v. Louisiana*, 391 U.S., at 155-156, 88 S.Ct., at 1450-1451.

*Taylor v. Louisiana*, 419 U.S. 522, 530-531, 95 S.Ct. 692, 698, 42 L.Ed.2d 690 (1975). "It affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law." *Powers v. Ohio*, 499 U.S. 400, 407, 111 S.Ct. 1364, 1369, 113 L.Ed.2d 411 (1991) (internal quotation marks omitted). It interposes "the commonsense judgment of a group of laymen" "between the accused and his accuser" and encourages "community participation and shared responsibility" in our system of justice. *Williams v. Florida*, 399 U.S. 78, 100, 90 S.Ct. 1893, 1906, 26 L.Ed.2d 446 (1970). It "preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people." *Powers*, 499 U.S. at 407, 111 S.Ct. at 1369.

The right to trial by jury "is granted to criminal defendants in order to prevent oppression by the Government." *Duncan*, 391 U.S. at 155, 88 S.Ct. at 1451. And, though the constitutional right to a jury trial belongs to a criminal defendant, the Commonwealth also has the right to a jury trial. RCr 9.26(1) (requiring consent of the Commonwealth before a bench trial may ensue); *Commonwealth v. Corey*, 826 S.W.2d 319, 321 (Ky. 1992) ("Indeed, RCr 9.26 seems to confer an absolute right to a jury trial upon either the defendant or the Commonwealth."); *Commonwealth v. Johnson*, 910 S.W.2d 229, 231 (Ky. 1995) (noting the Commonwealth has a "right to insist upon a jury."). "The Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal, which the

Constitution regards as most likely to produce a fair result"—the jury. *Singer v. United States*, 380 U.S. 24, 36, 85 S.Ct. 783, 790, 13 L.Ed.2d 630 (1965).

The public also has a right of "participation in the process." *Johnson*, 910 S.W.2d at 231. More specifically, qualifying citizens have rights with regard to jury trials because "one of the principal justifications for retaining the jury system" is "[t]he opportunity for ordinary citizens to participate in the administration of justice." *Powers*, 499 U.S. at 406, 111 S.Ct. at 1368. Participation in the jury system allows citizens to be part of the judicial system and to prevent its arbitrary use or abuse. *Id.* Besides voting, the right to participate in jury service is the "most significant opportunity [for most citizens] to participate in the democratic process." *Id.* at 407, 111 S.Ct. at 1369. "Community participation in the administration of the criminal law . . . is also critical to public confidence in the fairness of the criminal justice system." *Taylor*, 419 U.S. at 530, 95 S.Ct. at 698.

The purposes of the jury are not served "if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool" and "[r]estricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." *Id.* Thus, an "essential component of the Sixth Amendment right to a jury trial" is "the selection of a petit jury from a representative cross section of the community."[5] *Id.* at 528, 95 S.Ct. at 697; *Berghuis v. Smith*, 559 U.S. 314, 319, 130 S.Ct.

[5] The fair-cross-section does not appear to be part of Kentucky's constitutional guarantee of a jury trial. Kentucky cases discussing the fair-cross-section requirement refer to the Sixth Amendment as the source of this right. See *e.g.*, *Johnson v. Commonwealth*, 292 S.W.3d 889, 894 (Ky. 2009) ("[T]he panel from which a petit jury is selected must be drawn from a representative cross-section of the community in order to satisfy the Sixth Amendment's guarantee to a fair and impartial jury."); and *Miller v. Commonwealth*, 394 S.W.3d 402, 409 (Ky. 2011) ("The Sixth Amendment right to a jury trial includes the right to a petit jury selected form a representative cross-section of the community."). And "the ancient mode of trial by jury"

1382, 1387, 176 L.Ed.2d 249 (2010) ("The Sixth Amendment secures to criminal defendants the right to be tried by an impartial jury drawn from sources reflecting a fair cross section of the community."). This is the fair-cross-section requirement. It helps ensure that juries "are more representative institutions than is the judiciary; they reflect more accurately the composition and experiences of the community as a whole, and inevitably make decisions based on community values more reliably, than can that segment of the community that is selected for service on the bench." *Spaziano v. Florida*, 468 U.S. 477, 486-487, 104 S.Ct. 3154, 3176, 82 L.Ed.2d 340 (1984) (Stevens, concurring in part and dissenting in part). It means that "arbitrary exclusions of a particular class from the jury rolls are forbidden." *Williams*, 399 U.S. at 102, 90 S.Ct. at 1907.

The fair-cross-section requirement, however, does not mean that defendants are entitled to a jury of any particular composition. *Taylor*, 419 U.S. at 538, 95 S.Ct. at 702; see also *Mash v. Commonwealth*, 376 S.W.3d 548, 553 (Ky. 2012). It "is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does)." *Holland v. Illinois*, 493 U.S. 474, 480, 110 S.Ct. 803, 807, 107 L.Ed.2d 905 (1990). The "point at which an accused is entitled to a fair-cross-section of the community is when the names are put in the box from which the panels are drawn." *Stanford v. Commonwealth*, 734 S.W.2d 781, 785 (Ky. 1987) *aff'd sub nom.*

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preserved by Kentucky's Constitution has not always been interpreted as identical to the jury trial right guaranteed by the Sixth Amendment. See, *e.g.*, *Simmons*, 394 S.W.3d at 909-911 (recognizing that although the United States Constitution has not been interpreted to require 12 person juries, the Kentucky Constitution requires them). The Kentucky Constitution has been specifically interpreted as "not attempt[ing] to regulate the manner in which jurors shall be selected or the qualifications they must possesses" or as "describe[ing] or designat[ing] the character or class of persons who must compose a jury." *Wendling v. Commonwealth*, 137 S.W. 205, 207, 143 Ky. 587 (Ky. 1911). In fact the *Wendling* court rejected the idea that the Kentucky Constitution required that a court provide "aliens" a "jury de meditate linguæ," that is, a jury "composed half of aliens and half of denizens."

*Standford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989) (internal quotation marks omitted). A "defendant has no right to a petit jury composed in whole or in part of persons of [the defendant's] own race." *Powers v. Ohio*, 499 U.S. at 404, 111 S.Ct. at 1367 (internal quotation marks omitted). "The limited scope of the fair-cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly 'representative' petit jury." *Lockhart v. McCree*, 476 U.S. 162, 173-174, 106 S.Ct. 1758, 1765, 90 L.Ed.2d 137 (1986). Indeed, it is recognized that "the 12-man jury cannot insure representation of every distinct voice in the community." *Williams*, 399 U.S. at 102, 90 S.Ct. at 1907; see also *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S.Ct. 1712, 1717, 90 L.Ed.2d 60 (1986) quoting *Akins v. Texas*, 325 U.S. 378, 403, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692 (1945) ("The number of our races and nationalities stands in the way of evolution of such a conception of the demand of equal protection."). Rather "[t]he fair-cross-section venire requirement assures . . . that in the process of selecting the petit jury the prosecution and defense will compete on an equal basis." *Holland*, 493 U.S. at 481, 110 S.Ct. at 807.

Under the fair-cross-section requirement, a defendant "does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria." *Powers,* 499 U.S. at 404, 111 S.Ct. at 1367 (1992) (internal quotation omitted); see also *Alexander v. Louisiana*, 405 U.S. 625, 628-629, 92 S.Ct. 1221, 1224, 31 L.Ed.2d 536 (1972) (A defendant "is entitled to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice."). Thus, citizens cannot be excluded from the opportunity to be jurors because of factors such as race or gender. See *e.g.*, *Holland*, 493 U.S. at 478, 110 S.Ct. at 806 ("It has long

been established that racial groups cannot be excluded from the venire from which a jury is selected."); *Duren v. Missouri*, 439 U.S. 357, 360, 99.SCt. 664, 666, 58 L.Ed.2d 579 (1979) (recognizing that systematic exclusion of women from jury venires violates the Constitution's fair-cross-section requirement);

The law is well settled that to show a *prima facie* case that the fair-cross-section requirement has been violated, a defendant must show:

> (1) That the group alleged to be excluded is a "distinctive" group in the community;
>
> (2) That the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
>
> (3) That this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

*Duren*, 439 U.S. at 364, 99 S.Ct. at 668; *Berghuis v. Smith*, 559 U.S. at 319, 130 S.Ct. at 1388; *Mash*, 376 S.W.3d at 552; *Johnson v. Commonwealth*, 292 S.W.3d 889, 894 (Ky. 2009); *Rodgers v. Commonwealth*, 285 S.W.3d 740, 759 (Ky. 2009). The dispositive question is "[t]o the extent underrepresentation existed, is it due to 'systematic exclusion'?" *Berghuis*, 559 U.S. at 330, 130 S.Ct. at 1394. The burden of proof is on the defendant. *Mash*, 376 S.W.3d at 552. "It is not enough to merely allege a particular jury failed to represent the community." *Id.* (internal quotation marks omitted). In the absence of a stipulation, "proof by taking evidence" is required to establish a *prima facie* case. *Commonwealth v. McFerron*, 680 S.W.2d 924, 927 (Ky. 1984).

**A. Appellee failed to prove a *prima facie* case that the fair-cross-section requirement was violated.**

In this case, Appellee repeatedly sought dismissal of the jury panel from which his petit jury would be selected based on the claim that the panel was not representative

of the community.[6] VR 11/18/2014, 11:04:28 and following; VR 11/18/2014, 01:25:30 and following; VR 11/18/2014, 02:50:45; VR 11/18/2015, 02:52:50 and following. Appellee complained because he was African-American and only one African-American was on the jury panel. Appellee made the first necessary showing to establish a violation of the fair-cross-section requirement because African Americans are considered a distinctive group in the community. *Mash*, 376 S.W.3d at 552; *Rodgers*, 285 S.W.3d at 759 ("African-Americans do indeed constitute a distinctive group for jury selection purposes.") Appellee offered no evidence as to the second or third inquiries. His counsel merely indicated that he had casually perused some unidentified census and believed Louisville's African American population was close to one quarter and assumed underrepresentation based upon the appearance of the particular panel before him. VR 11/18/2014, 01:26:30. However, "'[a] showing of underrepresentation must be predicated on more than mere guesswork.'" *Miller*, 394 S.W.3d at 409 quoting *United States v. Lara*, 181 F.3d. 183, 192 (1st Cir. 1999).

This Court has repeatedly denied defendants' claims that they were denied a fair trial by violation of the fair-cross-section requirement in circumstances similar to those presented in this case. In *Mash*, for example, the defendant complained that the fair-cross-section requirement had been violated when a panel of 42 potential jurors,

[6] Appellee's counsel also stated that the due process and equal protection clauses supported his request for dismissal of the panel since only one person of Appellee's race was included in the panel. See *e.g.*, VR 11/18/2014, 11:24:54; VR 11/18/2014, 02:55:11. Undoubtedly, a state "denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." *Batson v. Kentucky*, 476 U.S. 79, 85, 106 S.Ct. 1712, 1716, 90 L.Ed.2d 69 (1986). Likewise, "a State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States" because "[i]llegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process." *Peters v. Kiff*, 407 U.S. 493, 502, 92 S.Ct. 2163, 2168, 33 L.Ed.2d 83 (1972). For the same reasons that Appellee failed to show that the fair-cross-section requirement was violated, any similar claims based on his equal protection and due process rights fail: there is no evidence that the state excluded any class of persons or discriminated in compiling the jury pool or specific panel which was eligible for selection as the petit jury in Appellee's case.

containing only one African American juror was provided in his case. *Mash*, 376 S.W.3d at 551. The Court described the requirements to "succeed on a challenge to the racial composition of the jury panel" and noted that although the defendant had met the first prong "because African Americans constitute a distinctive group in the community," the defendant had "failed to meet the second and third prong because he did not provide any information to the trial court about the number of African Americans in McCracken County or establish that there had been systematic exclusion of the group in the jury selection process." *Id.* at 552. Specifically, the Court noted that "mere citation to census data, without any other information, is not enough to *show underrepresentation or systematic exclusion*." *Id.* (emphasis added). The Court explained that "[a] defendant may demonstrate systematic exclusion by providing statistical information showing that a particular group was underrepresented in a county's jury panel *over a period of time*" or by showing "that something about the way a county selects its jury panels or creates its master list of jurors leads to systematic exclusion of a particular group." *Id.* at 552-553 (emphasis in original). In ultimately rejecting the defendant's fair-cross-section claim, the *Mash* court wrote:

> In this case, the only evidence presented to the trial court on this issue was that there was one African American out of 42 potential jurors on the jury panel for Appellant's trial. Appellant provided no context for that number; he did not provide information about the number of African Americans in McCracken County, he did not provide comparison information about the racial composition of other jury panels in the county, and he did not identify anything about the process of summoning jurors that would suggest racial imbalance. The bare "one out of 42" statistic, even when considered in conjunction with the census data that was not presented to the trial court, is simply not enough to demonstrate unreasonable underrepresentation or systematic exclusion.

*Id.* at 553. Notably, in *Mash*, the lone African American juror was ultimately removed by the Commonwealth's appropriate peremptory challenge.[7] *Id.* at 553. The jury that convicted the defendant in *Mash* was an all-white jury—as a consequence of the Commonwealth's exercise of a peremptory strike. Nonetheless, the Court found no fair-cross-section violation when the defendant was tried and convicted by an all-white jury. In this case, Appellee's evidence of a fair-cross-section violation was likewise lacking. Further, and unlike *Mash*, it was not by the Commonwealth's doing that the jury ended up lacking any African Americans. Rather, it was by random selection by the clerk of the court.

Similarly, in *Miller*, 394 S.W.3d at 409-410, the defendant claimed his jury panel failed to represent a fair cross section of the community because "none of the thirty-seven people called for the *voir dire* panel was African American and the eventual jury was composed entirely of Caucasians." The Court found the defendant's reference to a 2010 U.S. Census insufficient "to establish a *prima facie* violation of the fair-cross-section requirement" because the defendant "failed to provide any data concerning past Adair County jury panels to establish African Americans are unfairly and unreasonably underrepresented" and failed to provide any proof "that the alleged underrepresentation [was] due to systematic exclusion." *Id.* at 410. Another problem with mere citation to census data is that not everyone counted in the census is eligible to serve as a juror so census numbers do not provide "a proper standard for comparison." *Ford v. Commonwealth*, 665 S.W.2d 304, 308 (Ky. 1983).

[7] The defendant claimed that the juror was struck in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), but that claim was rejected because the Court found that the Commonwealth stated a race-neutral basis for the strike, and the trial court properly found that the purported reason for the strike was not a pretext for discrimination. *Mash*, 376 S.W.3d at 555-557.

In this case, Appellee provided no evidence about the proportion of eligible African American jurors in Jefferson County. He offered no evidence about the composition of any past (or even the present) jury pool. Based on its experience, the trial court found that the makeup of the panel before it was an anomaly in Jefferson County. See *e.g.*, VR 11/18/2014, 01:23:34; VR 11/18/2014, 01:29:00; VR 11/18/2014, 02:57:46. The trial court had not experienced systematic exclusion of African American citizens from jury service in Jefferson County. Based on the lack of evidence before it and its experience as a trial judge, it was entirely proper for the trial court to overrule Appellee's motion for dismissal of the panel based on the alleged violation of the fair-cross-section requirement. In fact, the trial court twice did so. It did so once before the parties exercised their strikes. VR 11/18/2014, 01:29:31. Then it did so again after the requisite number of petit jurors had been selected through the combination of for cause, peremptory, and random strikes. VR 11/18/2014, 02:52:18. The second overruling of the motion occurred after the sole African American juror had been struck. *Id.* On further reflection, however, the trial court determined that the random removal of the only African American juror warranted a finding that the fair-cross-section requirement had been violated and dismissal of the panel. VR 11/18/2014, 02:58:26.

Unlike the cases discussed above, this case does not involve an accusation that the trial court improperly denied a motion to dismiss a jury panel for violation of the fair-cross-section requirement. Rather, this case raises questions about the extent of a trial court's discretion. Absent evidence of a violation of the fair-cross-section requirement, does a trial court have authority to dismiss a jury panel because of perceived or actual racial imbalance on the panel? Does the trial court have authority to dismiss selected

jurors because if those jurors are seated as the petit jury, there will be no African American on the petit jury? Does the trial court have discretion to dismiss a petit jury because none of its members is of the same race as the defendant even though the law is clear that a defendant is not entitled to a jury of any specific racial composition? These appear to be questions of first impression for this Court.

Trial courts have broad discretion when it comes to the entire jury selection process "from summoning the venire to choosing the petit jury which actually hears and decides the case." *Brown v. Commonwealth*, 313 S.W.3d 577, 596 (Ky. 2010). For example, they have discretion to "direct the scope of *voir dire*," *Lawson v.* Commonwealth, 53 S.W.3d 534, 539 (Ky. 2001), "in the area of questioning on *voir dire*," *Woodall v. Commonwealth*, 63 S.W.3d 104, 116 (Ky. 2001), in determining whether to strike a prospective juror for cause, *Sherroan v. Commonwealth*, 142 S.W.3d 7, 16 (Ky. 2004), and in whether to allow the press to be present during individual *voir dire*, *Brown v. Commonwealth*, 890 S.W.2d 286, 289 (Ky. 1994). A trial court's discretion, like any government action, may not be exercised in a way that is absolute and arbitrary. Ky. Const. § 2. An abuse of discretion that is "clear and gross" may offend the Kentucky Constitution's guaranty "against the exercise of arbitrary power." *Commonwealth, Department of Highways v. Burchett*, 367 S.W.2d 262, 266 (Ky. 1963). "Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision. The exercise of discretion must be legally sound." *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994) (internal quotation marks and citations omitted). To determine whether a trial court's exercise of discretion in *voir dire* was appropriate or

abusive, the reviewing court should ask "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Prater v. Commonwealth*, 421 S.W.3d 380, 384 (Ky. 2014) (internal quotation marks omitted).

To determine whether it is an abuse of discretion to dismiss a jury panel for violation of the fair-cross-section requirement where there is no evidence of systematic exclusion of a distinctive class of prospective jurors, it is worth considering what happens when a defendant makes a *prima facie* showing that the fair-cross-section requirement has been violated. Importantly, that does not end the court's inquiry. *Duren*, 439 U.S. at 367, 99 S.Ct. at 670 ("The demonstration of a *prima facie* fair-cross-section violation by the defendant is not the end of the inquiry into whether a constitutional violation has occurred."). Rather, "[o]nce a *prima facie* case of invidious discrimination is established, the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Alexander*, 405 U.S. at 631-632, 92 S.Ct. at 1226; see also *White v. Georgia*, 414 U.S. 886, 888-889, 94 S.Ct. 222, 223-234, 38 L.Ed.2d 134 (Mem) (1973) (Brennan dissent) (discussing procedure upon establishment of *prima facie* case of fair-cross-section requirement). Alternatively, "once the defendant has made a *prima facie* showing of an infringement of his constitutional right to a jury drawn from a fair cross section of the community, it is the State that bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest." *Duren*, 439 U.S. at 368, 99 S.Ct. at 671. Importantly, when a defendant fails to establish a *prima facie* case of systematic exclusion, it is error to

require the Commonwealth to go forward with proof "to establish validity of [a] jury panel." *McFerron*, 680 S.W.2d at 927.

The rules establishing an evidentiary burden and granting an opportunity for rebuttal of that evidence before an alleged violation of the fair-cross-section requirement warrants relief are important because they prevent the kind of absolute and arbitrary action precluded by Section 2 of the Kentucky Constitution. They also provide a measure for this and other reviewing Courts when evaluating whether a trial court acted appropriately. As with other aspects of *voir dire*, a trial court's discretion is "not boundless" and there must be some standard for evaluating on review whether the trial court committed an abuse of discretion. *Hayes v. Commonwealth*, 175 S.W.3d 574, 583 (Ky. 2005) (discussing that though the trial court has discretion to limit the scope of *voir dire*, that discretion is not boundless, and is reviewed for abuse of discretion based upon a test asking whether the trial court's limitation prevented the defendant from having a fair trial).

The law clearly imposes an evidentiary burden upon a defendant striving to show that the fair-cross-section requirement of the Sixth Amendment has been violated. It reasonably allows the Commonwealth to rebut any such evidence, if it is produced. If a criminal defendant fails to meet his burden for showing a violation of the fair-cross-section requirement, a trial court's decision to strike the panel for a violation of the fair-cross-section requirement is unreasonable and unfair because the Commonwealth has been denied the opportunity to rebut the claim. Furthermore, when the trial court's decision that the fair-cross-section requirement has been violated is based upon a change in the racial composition of the would-be petit jury based upon the undeniably random,

necessary, and legally appropriate removal of one juror, it is arbitrary. Where the decision is based on a belief that the criminal defendant is entitled to at least one African American juror on his petit jury, it is unsupported by sound legal principles.

Undoubtedly, the fair-cross-section requirement has a historical and critical place in the jury system (see discussion *supra*). However "preservation of randomness is [also] a central principle in the jury selection process." *Hodge v.* Commonwealth, 17 S.W.3d 824, 840 (Ky. 2000); *Williams v. Commonwealth*, 734 S.W.2d 810, 812 (Ky. App. 1987) ("The central principle in any jury selection is the preservation of randomness all through *voir dire* and peremptory challenges."). "Randomness means that, at no time in the jury selection process will anyone involved in the action be able to know in advance, or manipulate, the list of names who will eventually compose the empaneled jury." *Id.* at 812-813. In this case, the trial court found a violation of one bedrock principle of the jury system (the fair-cross-section requirement) by the appropriate, proper exercise of another central principle of the jury selection process (randomness). This was an abuse of discretion.

The fair-cross-section requirement ensures the "'fair possibility' of a representative jury." *Holland*, 493 U.S. at 478, 110 S.Ct. at 806. It does not ensure that the makeup of any particular petit jury will reflect a cross section of the community or guarantee a *representative* jury. *Id.* at 480, 110 S.Ct. at 807. Rather, its goal is ensuring an *impartial* jury as required by the Constitution. *Id.* It also serves to ensure that "in the process of selecting the petit jury the prosecution and defense will compete on an equal basis." *Id.* at 481, 110 S.Ct. at 807. In this case, there was no evidence regarding the racial makeup of the entire pool of potential jurors from which the 41 jurors were

randomly selected and assigned to Division 6. Nor is there any evidence regarding the racial makeup of any past pool or panel of potential jurors. Anecdotally—and indicating that what occurred in this case was an aberration, rather than evidence of systematic exclusion—the trial court and the Commonwealth noted that it was unusual to see only one African American person on a jury panel. See *e.g.*, VR 11/18/2014, 11:05:44; VR 11/18/2014, 01:23:34; VR 11/18/2014, 02:55:21; VR 11/18/2014, 02:57:46.

The trial court twice denied the motion to dismiss the panel, finding that the fair-cross-section requirement had been met. VR 11/18/2014, 01:29:16; VR 11/18/2014, 02:52:18. Then, after the lone African American juror was struck at random, the trial court reversed course, and granted the motion to strike the panel. VR 11/18/2014, 02:58:26. This decision was contrary to the abundance of cases announcing that there is no entitlement to a specific racial makeup of a petit jury.

The proposition that a defendant is entitled to a petit jury that reflects a fair cross section of the community has long been rejected under the federal constitution—largely because of its impossibility or at least its impracticability. See *e.g.*, *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220, 66 S.Ct. 984, 985, 90 L.Ed. 1181 (1946) (recognizing that though "[t]he American tradition of trial by jury" "necessarily contemplates an impartial jury drawn from a cross-section of the community," it does not require that "every jury" have such composition because "frequently such complete representation would be impossible."). And although "[s]tates are free to provide greater protections in their criminal justice system than the Federal Constitution requires," *California v. Ramos*, 463 U.S. 992, 1014, 103 S.Ct. 3446, 3460, 77 L.Ed.2d 1171 (1983), it is difficult to see how such a requirement would be enforced because "[w]e are a Nation not of black and white

alone." *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 723-724, 127 S.Ct. 2738, 2754, 168 L.Ed.2d 508 (2007) (internal quotation marks and citation omitted).

Would jury pool administrators be required to divide the jury pool into subgroups based upon the distinctive segments of a community's population? Would these subgroups include only race, gender, and ethnicity? Or would they also include sexual orientation, national origin, and religion, if distinctive portions of a community's population are characterized by these varying experiences and viewpoints? Would it be sufficient to divide a jury pool into such subgroups based on voluntary self-report or would a new requirement of jury service be mandatory classification and proof of one's inclusion in the particular subgroups? Would venires assigned to individual courtrooms be required to contain a certain number of prospective jurors from each subgroup? If some or all of those prospective jurors were dismissed for cause or in the lawful exercise of peremptory challenges, would a new jury panel be required or only replacement from the remaining subgroup population in the larger jury pool? If more than the minimum required percentage of a distinctive group remained at the end of *voir dire*, would the parties be permitted to select the requisite number of representative jurors from that subgroup? Would they be required to accept a petit jury that was overly representative of that subgroup to the underrepresentation of another subgroup? Would citizens from the least populous distinctive groups in the community essentially become professional jurors—overburdened by the time commitments and lack of reasonable pay—because of the requirement that their distinctive group be represented on each petit jury?

Notably, the United States Supreme Court has found that jury selection systems that identify prospective jurors by race are ripe for discrimination. See *e.g.*, *Alexander*, 405 U.S. at 630-632, 92 S.Ct. at 1225-1226 (discussing several state systems that provided for race identifiers prior to random selection and explaining that those systems made it easier for those who were inclined to discriminate to do so). "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Seattle School District*, 551 U.S. at 720, 127 S.Ct. at 2752 (internal quotation marks omitted). Moreover, "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Id.* at 746, 127 S.Ct. at 2767 (internal quotation marks omitted). When the government "endorse[s] race-based reasoning and the conception of a Nation divided into racial blocs," it "contribut[es] to an escalation of racial hostility and conflict." *Id.* (internal quotation marks omitted). Dividing prospective jurors into subgroups based on race, gender, or ethnicity "demeans the dignity and worth of [the individual by judging] by ancestry instead of by his or her own merit and essential qualities." *Id.* (internal quotations omitted).

"Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." *Thiel*, 328 U.S. at 220, 66 S.Ct. at 986. Prevention of discriminatory state action in creation of the jury pool, assignment to the venire, and the seating of the petit jury and the opportunity of a representative cross section of the community to serve as jurors adequately protects criminal defendant's rights, the rights of members of the community

to participate in the criminal justice system, and the purposes behind the jury trial system. Given the complexity of a system that would necessarily involve an unjustified classification[8] of jurors based on class status, the fair-cross-section requirement should not be extended to the petit jury.

**B. In the absence of *prima facie* evidence of systematic exclusion or of the ability of any individual juror not to be fair, the Commonwealth had a right to proceed with a duly selected petit jury.**

A related issue is whether the Commonwealth has a right to proceed with a duly selected jury when a *prima facie* case of violation of the fair-cross-section requirement has not been made and whether that right is contingent upon the racial makeup of the petit jury selected.

In Kentucky, the Commonwealth also has a right to a jury trial." RCr 9.26(1) (requiring consent of the Commonwealth before a bench trial may ensue); *Johnson*, 910 S.W.2d at 231; *Corey*, 826 S.W.2d at 321. "The object of *voir dire* is to start the trial on a level playing field." *Thomas v. Commonwealth*, 864 S.W.2d 252, 259 (Ky. 1993). The Commonwealth, as well as the defendant, is entitled to an impartial jury. *Sullivan v. Commonwealth*, 304 Ky. 783, 784, 202 S.W.2d 620, 621 (Ky. 1947); see also *Holland*, 493 U.S. at 483, 110 S.Ct. at 809 ("Although the constitutional guarantee [of the Sixth

[8] The Commonwealth is aware of various opinions and studies indicating that all-white juries are more likely to convict than are juries containing a more diverse mix of individuals, but is unable to see how such opinions and studies justify racial classification of jurors and a requirement that the petit jury reflect a cross section of the community. See *e.g.*Anwar, Bayer, and Hjalmarsson, "The Impact of Jury Race in Criminal Trials," Quart. J. Econ. 2012, P. 5 (recognizing however, that "[t]he ability . . . to draw firm conclusions about the fairness of trial outcomes . . . is fundamentally limited by the fact that the strength of the evidence in cases brought against white and black defendants is not observed directly in the data.") available at https://qje.oxfordjournals.org/content/early/2012/04/15/qje.qjs014.full.pdf+html (accessed on December 22, 2015). The Sixth Circuit Court of Appeals recently considered this type of evidence in relation to a defendant's claim that the Sixth Amendment fair-cross-section requirement was violated. In *Ambrose v. Booker*, 801 F.3d 567, 579 (6th Cir. 2015), the Court of Appeals faulted the trial court for relying on an expert's testimony that "racially diverse juries are less likely to convict than all-white juries" in part because the testimony lacked any individualized assessment of the evidence against the defendant and relied on impermissible racial stereotypes.

Amendment] runs only to the individual and not to the State, the goal it expresses is jury impartiality with respect to both contestants: neither the defendant nor the State should be favored."). "[I]mpartiality is not a technical question but a state of mind." *Shane v. Commonwealth*, 243 S.W.3d 336, 338 (Ky. 2007). "[A]n impartial *jury* consists of nothing more than '*jurors* who will conscientiously apply the law and find the facts.'" *Lockhart*, 476 U.S. at 178, 106 S.Ct. at 1767 quoting *Wainwright v. Witt*, 469 U.S. 412, 423, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985). "[T]he Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case." *Id.* at 184, 106 S.Ct. at 1770. Where there is no reason to believe that selected jurors cannot be fair and impartial and where there is no showing that the fair-cross-section requirement was violated, the jury is properly constituted, a level playing field is provided, and the Commonwealth should be permitted to proceed with the selected jury.

The Commonwealth bears the "responsibility to ensure that cases are timely resolved," *Dickerson v. Commonwealth*, 278 S.W.3d 145, 151 (Ky. 2009), and has an "interest in judicial economy," *Benjamin v. Commonwealth*, 266 S.W.3d 775, 790 (Ky. 2008). The Commonwealth's Attorney has an obligation to "make a reasonable effort to insure that [a]ll victims and witnesses who are required to attend criminal justice proceedings are notified promptly of any scheduling changes that affect their appearances." KRS 421.500(5)(a). All of these duties are complicated where a duly

selected jury is set aside on unsupported grounds of a fair-cross-section requirement violation.

The principles of judicial economy and traditional notions of fair play and substantial justice support recognizing the right of the Commonwealth to proceed with a duly selected jury in the absence of *prima facie* evidence of a violation of the fair-cross-section requirement. Consider how such principles have previously been applied by this Court. In *Hearn v. Commonwealth*, 80 S.W.3d 432, 435-436 (Ky. 2002), for example, the Court recognized that authorizing a trial court to order interest on restitution served "judicial economy and the traditional notions of fair play and substantial justice" despite the absence of a specific statutory provision authorizing restitution. In cases where the Court considers the appropriateness of joinder of charges, joinder may be upheld where "the promotion of economy and efficiency in judicial administration by the avoidance of needless multiplicity of trials was not outweighed by any demonstrably unreasonable prejudice to the defendant as a result of the consolidations." *Brown v. Commonwealth*, 458 S.W.2d 444, 447 (Ky. 1970). In *Grady v. Commonwealth*, 325 S.W.3d 333, 342 (Ky. 2010), the court recognized that concepts of judicial economy and common sense were served by doing away with rigid requirements when a trial court addressed a defendant's waiver of counsel so long as minimal determinations were made to ensure that a defendant's rights were not violated. In *Kirkland v. Commonwealth*, 53 S.W.3d 71, 75 (Ky. 2001), the court determined that harmless error analysis was appropriate in determining whether violation of RCr 8.30(1) entitled defendants to reversal because automatically requiring reversal would defy logic and ignore principles of judicial economy. Similar interests in judicial economy, traditional notions of fair play and

substantial justice, avoidance of unnecessary delay and extra proceedings, common sense and logic dictate that when a defendant has failed to prove a violation of the fair-cross-section requirement and a fair and impartial jury is seated, he is not entitled to a do-over merely because he would prefer a different racial composition of his jury. The Commonwealth is entitled to proceed to trial with the selected jury[9].

Moreover, as noted above, had the necessary *prima facie* showing been made, the Commonwealth would have had the opportunity to rebut that evidence. In doing so, the Commonwealth might have offered the testimony of a jury pool administrator regarding the process of summoning a jurors and assigning a panel to a particular courtroom (compare *e.g.*, *United States v. Allen*, 160 F.3d. 1096, 1100-1101, 1104 (6th Cir. 1998)) or statistics similar to those contained in Appendix 3, which show the racial composition of jury pools and petit juries in Jefferson County for a particular period of time. However, because Appellee never met his burden of proof, the Commonwealth did not offer such evidence; and a properly constituted jury was set aside without the Commonwealth being properly afforded the opportunity to dispute the allegation of a fair-cross-section violation. If Appellee had met his burden, the Commonwealth could have overcome or refuted his evidence in such a way that it would have been entitled to proceed with the petit jury selected. It is unfair, when there was no reason for the Commonwealth to put on any evidence, to penalize the Commonwealth for failing to refute an unsupported allegation of violation of the fair-cross-section requirement.

lines 11 and 12 stricken per court order - 2/17/16.

[9] It should be noted that the Commonwealth's claimed entitlement to this jury has nothing to do with the final racial composition of the selected petit jury. Like a defendant, the Commonwealth has no entitlement to a jury of any particular racial composition. The Commonwealth's right to proceed with the selected jury has to do with the lack of evidence of any impropriety in the jury selection procedure, the record which establishes no reason to believe that the selected jurors could not fairly and impartially decide the case, the right of citizens to participate in jury service (as will be discussed in more detail in the following section), the interest in preserving judicial and prosecutorial resources, and the goal of swiftly bring about justice.

Appellee's rights were not violated by the jury selection process. There is no reason to believe that he would not have received a constitutionally required trial by a fair and impartial jury if the selected jury had been empaneled. The Commonwealth should not have been required to expend additional, valuable resources in a second *voir dire*. Though a jury deemed appropriate by the trial judge was seated through the second *voir dire* process, one can imagine scenarios in which because of the valid exercise of cause and peremptory strikes in combination with necessary random strikes, all prospective African American jurors are struck on panel after panel. If the trial court is allowed time and time again to dismiss such panels despite no evidence of systematic exclusion or intentional discrimination, justice is unfairly and unnecessarily delayed. Where no prejudice to a defendant is shown, the Commonwealth should be permitted to proceed with a constitutionally selected jury, even if no African American jurors are on the jury.

**C. The individual jurors on the originally selected petit jury had the right not to be excluded from jury service based upon race.**

Appellee and the Commonwealth's rights are not the only rights at issue. As described above the benefits of a jury trial system include public participation in and community responsibility for the criminal justice system. As such, citizens have certain rights as it relates to potential jury service. Importantly, an individual juror has no right to sit on any particular petit jury; however "he or she does possess the right not to be excluded from one on account of race." *Georgia v. McCollum*, 505 U.S. 42, 48, 112 S.Ct. 2348, 2353, 120 L.Ed.2d 33 (1992) (internal quotation marks omitted). The United States Supreme Court has "in an almost unbroken chain of decisions" "gradually . . . abolished race as a consideration for jury service." *Id.* at 46, 112 S.Ct. at 2352. When citizens are excluded for discriminatory reasons, "there can be no doubt that the harm is

the same—in all cases, the juror is subjected to open and public [and unconstitutional] racial discrimination." *Id.* at 48-49, 112 S.Ct. 2348, 2353. Discriminatory jury selection harms excluded jurors and the entire community. *Id.* at 49, 112 S.Ct. at 2353. If a court allows jurors to be excluded because of group bias, "[it] is [a] willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it." *Id.* at 49-50, 112 S.Ct. at 2354.

The rights of prospective jurors are entitled to judicial enforcement; however, the barriers for individually excluded jurors to bring suit are "daunting." *Id.* at 56, 112 S.Ct. at 2357. Because the state suffers a cognizable injury "when the fairness and integrity of its own judicial process is undermined" by racial discrimination in the selection of jurors and because "[a]s the representative of all its citizens, the State is the logical and proper party to assert the invasion of the constitutional rights of the excluded jurors in a criminal trial," the Commonwealth has standing to assert the rights of jurors improperly excluded on the basis of race. In this case, though they were not sworn as the petit jury, 14 panel members were selected to become the petit jury. They were then dismissed because none of them were African American. Because, as described above, the absence of African Americans was not the result of a violation of the fair-cross-section requirement, dismissal of the jurors was not required as a result of that accusation. The question is whether there was any reason—other than the race of these jurors—justifying their exclusion from jury service.

"It is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race." *Id.* at 57, 112 S.Ct. at 2358. Of course, "a defendant has the right to an impartial jury that can view him without racial

animus," and there "should be a mechanism for removing those on the venire whom the defendant has specific reason to believe would be incapable of confronting and suppressing their racism." *Id.* at 58, 112 S.Ct. at 2358-2359. However, there is a difference in removing a juror who "harbors racial prejudice" and removing a juror on account of race based on "assumptions of partiality." *Id.* at 59, 112 S.Ct. 2348, 2359.

A trial court has discretion in determining whether to excuse a juror for cause. See *e.g., Wood v. Commonwealth*, 178 S.W.3d 500, 515-516 (Ky. 2005).

> When the question is analyzed as to whether the trial court judge abused his discretion, a reviewing court must determine if the trial court had a sound legal basis for his ruling. If a judge errs on a finding of fact, he must be clearly erroneous or there is no error; if error is premised on incorrect application of the law, a judge abuses his discretion when the legal error is so clear that there is no room for the judge to have ruled any differently. RCr 9.36 requires a judge to excuse a juror if there is a reasonable basis to believe the juror cannot be fair and impartial.

*Shane*, 243 S.W.3d at 338. This Court recently described the difficulty in establishing any claim for relief when a court strikes a juror for cause, explaining that "striking a juror for cause would have to be an abuse of discretion tantamount to some kind of systematic exclusions, such as for race, in order to be reversible." *Basham v. Commonwealth*, 455 S.W.3d 415, 421 (Ky. 2015).

"A potential juror should be excused for cause *only* when the juror cannot conform his views to the requirements of law and render a fair and impartial verdict." *Sholler v. Commonwealth*, 969 S.W. 2d 706, 708 (Ky. 1998) (emphasis added). Trial courts should strike a juror "when a reasonable person would question whether the juror would be fair, because a fair juror is at the heart of a fair and impartial trial." *Basham*, 455 S.W.3d at 421. The United States Supreme Court has "firmly rejected the view that assumptions of partiality based on race provide a legitimate basis for disqualifying a

person as an impartial juror," drawing a distinction between removing individual jurors who harbor racial prejudice and discriminating invidiously against jurors on account of race. *McCollum*, 505 U.S. at 59, 112 S.Ct. at 2359.

In this case, there was no particular concern about any one individual juror. Rather, the trial court's concern was about the class of jurors selected to hear Appellee's case, not because of any particular expressions of bias or intent made by any of the jurors, but because none of the jurors belonged to another class. The 14 selected jurors were not seated as jurors. They were excused because of race—namely, that none of them was African American or that all of them was white. Appellee made no motions to strike any of the jurors originally selected to be on his petit jury because of their racial animus against him. The record reveals none; likewise it reveals no other reasons to strike the jurors for cause.[10] Not only was it an abuse of discretion to strike the jurors, it violated their constitutional rights not to be discriminated against in jury selection because of their race. "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Seattle School District*, 551 U.S. at 748, 127 S.Ct. at 2768. A party may not exercise a challenge based "on either the race of the juror or the racial stereotypes held by the party." *McCollum*, 505 U.S. at 59, 112 S.Ct. at 2359. A trial court should not

[10] The trial court specifically expressed that because Appellee was an African American man it was concerned about the lack of any African American juror, implying—without any evidence—that the jury, because it lacked African Americans, could not be fair to an African American defendant. This is precisely the type of "group bias" and unjustified assumption that is unwarranted. Particularly in this day and age with the proliferation of integrated communities and schools, interracial and cross-ethnic marriages, biracial and multi-ethnic heritages, and transracial and cross-ethnic adoptions, and where peer groups, friendships, and other relationships are no longer bound by city blocks or even national boundaries, it is unfair any longer to assume that because of a person's skin color he or she cannot adequately relate to or at least understand and empathize with the experiences of a person of a different race or ethnic background. While it may not be necessary to assume that everyone is enlightened and does not harbor the historical prejudices that existed in this country, there was ample opportunity during *voir dire* for the parties and court to question and identify any such biases. Yet, there was not one single question asked of the jury panel about their suppositions concerning people of different races or their relationships with or knowledge of people of Appellee's race. It was inappropriate to strike the jury based on unsubstantiated perceptions of unfairness.

be permitted to do so either. The duly selected jurors had a right not to be excluded as jurors because of their race.

**III. Procedures when jurors have previously participated in *voir dire*.**

After the trial court dismissed the first jury panel, a new jury panel was made available. Before *voir dire* began, the Commonwealth questioned how the prior day's proceedings would play into *voir dire* if potential jurors from the prior day were part of the new panel. VR 11/19/2014, 09:50:26. The trial court instructed the parties to "erase" the prior *voir dire* from their minds and said that what jurors said the prior day should not be considered for any purpose, including impeaching any juror who made a different statement during the new *voir dire* or as the basis for any cause or peremptory strike. VR 11/19/2014, 09:51:25. This was error.

In Jefferson County jurors are generally summoned for two week terms, and they are for the county's "court system as one judicial system and not just for one division or court." *Hayes v. Commonwealth*, 320 S.W.3d 93, 98 (Ky. 2010). Therefore, it is possible—even likely—that potential jurors will participate in more than one *voir dire* examination during their time of jury service, being called upon each to time to provide sworn testimony that will be used to evaluate the juror's ability to be fair and impartial.

As explained previously, the Commonwealth and the criminal defendant are entitled to an impartial jury. Excusal of a juror is required "[w]hen there is reasonable ground to believe that [the] prospective juror cannot render a fair and impartial verdict on the evidence." RCr 9.36. It is, however, "incumbent upon the party claiming bias or partiality to prove the point." *McGaha v.* Commonwealth, 414 S.W.3d 1, 6 (Ky. 2013) (internal quotation marks omitted). He must "present facts, if they exist, casting doubt

about the impartiality of the juror." *Id.* at 7. Accordingly, "[o]ne purpose of the *voir dire* examination . . . is to afford the challenging party true information concerning any possible basis for bias or prejudice in order not to be misled." *Jackson v. Commonwealth*, 323 S.W.2d 874, 875 (Ky. 1959). This purpose is defeated and the parties' opportunity to adequately challenge jurors for cause is obfuscated if jurors are allowed to provide sworn answers in one *voir dire* proceeding and then provide different sworn answers in another *voir dire* without the former answers being allowed to be used by the parties to identify bias or prejudice that might prevent the juror from being fair or impartial.

A potential juror commits "a flagrant abuse of juror responsibility," entitling a defendant to reversal of any conviction, when he or she fails to disclose critical information of bias in response to a directed question in *voir dire*. *Paenitz v. Commonwealth*, 820 S.W.2d 480, 481 (Ky. 1991). "In order to take advantage of the misconduct of a juror on a *voir dire* examination, it must be shown by sworn testimony that the objecting party was misled and that he made known his objection as soon as the truth was discovered." *Jackson*, 323 S.W.2d at 876. Where the information a potential juror provided in a prior *voir dire* proceeding is relevant to determining whether the individual could be a fair and impartial juror, a party should be permitted to inquire of the juror concerning the prior statements or to bring those statements to the trial court's attention for consideration as grounds for excusing the juror for cause. The recorded in-court statements are capable of being reviewed, and a court may take judicial notice of them under KRE 201.

Furthermore, a defendant who establishes after trial that "a juror failed to answer honestly a material question on *voir dire*, and then further show[s] that a correct response would have provided a valid basis for a challenge for cause" is entitled to a new trial. *Brown v. Commonwealth*, 174 S.W.3d 421, 430 (Ky. 2005) (internal quotation marks omitted). A defendant, who knows of a juror's failure to honestly answer a material question because of the juror's responses in a prior *voir dire*, should not be required to wait until he is convicted in order to obtain relief. He should be allowed and even required, if he knows of the juror's prior statement, to bring it to the court's attention prior to the seating of the jury so that the matter can be efficiently considered at a time when the juror is still available for additional inquiry if it is deemed necessary. See *Jackson*, 323 S.W.2d at 876 ("A party should not, with knowledge of misconduct on the part of the jury, conceal it from the court, and take the chance of a verdict in his favor, with the expectation of having it set aside if adverse to him.").

Additionally, the prior *voir dire* statements of potential jurors should be allowed to be considered by the parties in exercising their peremptory strikes. "[T]he peremptory challenge occupies an important position in our trial procedures." *Batson*, 476 U.S. at 98, 106 S.Ct. at 1724. It essentially allows a party to excuse a juror for any non-discriminatory reason. *Id.* When a party is aware of prior sworn, verifiable statements made by a potential juror in another *voir dire* proceeding, the party should be permitted to consider and rely on those statements when exercising its peremptory challenges.

Because of the critical importance of a fair and impartial jury, a trial court should not be permitted to require parties to "forget" sworn, verifiable statements they know that potential jurors previously made. Rather, the parties should be allowed to question jurors

about those prior statements and to consider those statements in determining whether to exercise a peremptory strike against a potential juror. Furthermore, when such statements are brought to the trial court's attention as part of a motion to excuse a juror for cause, the trial court should consider those statements, inquiring of the potential juror about them or reviewing the prior sworn testimony, if necessary.

## CONCLUSION

This Court granted the Commonwealth's request for certification of law related to various jury selection procedures employed by the trial court. For all the reasons discussed above, this Court should answer the Commonwealth's questions as follows.

I. May a trial court dismiss a jury based upon a claim that the fair-cross-section requirement has been violated when there has been no evidence of systematic exclusion of a class of persons from jury service?

**No.** Dismissing a jury based upon an unsubstantiated fair-cross-section violation erodes confidence in the jury procedures in place—many of which have evolved specifically to ensure that juries are selected from a fair cross section of the community. Dismissal without *prima facie* evidence also prevents or limits the Commonwealth's proof in rebuttal to the alleged constitutional violation.

Does it matter if there was only one African American juror on the panel and that juror was struck randomly?

**No.** That the lone African American juror was struck randomly in the presence of the trial judge specifically counters any claim that the fair-cross-section requirement was violated by systematic exclusion or intentionally discriminatory conduct by the Commonwealth. The random striking of the African American juror should have had no bearing on the trial court's decision whether to dismiss the jury for the alleged violation of the fair-cross-section requirement because a defendant is not constitutionally entitled to any

particular racial composition of his petit jury. When there is no proof of systematic exclusion—*i.e.,* discrimination against citizens in the jury selection process—a trial court should overrule a motion to dismiss the jury based on claims that the fair-cross-section requirement is violated, regardless of the final composition of the petit jury.

II. Does the Commonwealth have a right to proceed with a duly selected jury when a *prima facie* case that the jury violates the fair-cross-section requirement has not been made?

**Yes.** The Commonwealth and the defendant have a right to a jury trial. They are both entitled to a fair and impartial jury. When a jury is selected in a non-discriminatory manner, without any indication that those finally selected to be on the petit jury could not be fair or impartial, judicial economy and traditional notions of justice and fairness dictate that the Commonwealth is entitled to proceed to trial with the selected petit jury.

Is the Commonwealth or a defendant's right contingent upon the racial makeup of the petit jury selected?

**No.** Neither a defendant or the Commonwealth (or the court, for that matter) is entitled to any specific racial makeup of the petit jury that hears a particular case. They are entitled to an impartial jury.

III. What, if any rights, do citizens who have been duly selected as jurors have to be sworn and hear a case when there is no evidence of systematic exclusion of a class of persons from jury service?

Though citizens have no general right to serve on any particular jury, once selected to be part of a petit jury, jurors have the right not to be excluded from that jury on the basis of their race. When jurors are properly selected from a panel of jurors, from which no distinctive class has been systematically excluded, and there is no reason to believe that those particular jurors cannot be fair and impartial, the jurors should not be excused because of perceived group bias.

IV. May a trial court disregard and instruct the parties to disregard prior sworn statements made on the record by prospective jurors during a previous *voir dire* proceeding?

**No.** Parties should not be required to disregard sworn statements that prospective jurors made in a prior *voir dire* proceeding that are relevant to determining whether those jurors will be a fair and impartial and appropriate jurors in a given case. The right of the parties to a fair and impartial trial is too important not to require jurors to be accountable for their prior sworn statements.

Should the trial court consider such statements in evaluating whether the juror should be struck for cause?

**Yes.** The trial court should consider statements potential jurors made in a prior *voir dire* proceeding if raised by the parties when evaluating whether a juror should be struck for cause. The same types of statements, if discovered after trial, could be the basis for granting a new trial. The opportunity to prevent an unfair trial should be welcomed, and a party should not be required or permitted to wait to see what the outcome is before deciding whether to claim that a known prior statement prejudiced a juror.

May the parties rely on such prior statements as grounds for seeking removal for cause or as grounds supporting the exercise of a peremptory challenge?

**Yes.** The parties should be permitted to rely on sworn, documented (or recorded) statements made by potential jurors in a prior *voir dire* proceeding as support for their exercise of peremptory challenges, and their requests to excuse jurors for cause.

Respectfully submitted,

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